

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of) EB Docket No. 07-147
PENDLETON C. WAUGH, CHARLES M.) File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP) NAL/Acct. No. 200732080025
)
PREFERRED COMMUNICATION) FRN No. 0003769049
SYSTEM, INC.)
)
Licensee of Various Site-by-Site Licenses)
in the Specialized Mobile Radio Service)
)
PREFERRED ACQUISITION, INC.) FRN No. 0003786183
)
Licensee of Various Economic Area Licenses)
in the 800 MHz Specialized Mobile Radio)
Services)

To: Chief Administrative Law Judge
Richard L. Sippel

MOTION FOR PARTIAL SUMMARY DECISION

Pendleton C. Waugh (“Waugh”), hereby submits a Motion for Partial Summary Decision pursuant to Section 1.251 of the Commission’s Rules, 47 CFR § 1.251, demonstrating that there are no genuine issues of material fact with regard to the following issues:

- a. To determine whether Pendleton C. Waugh was an undisclosed real party in interest in filings before the Commission, in willful and/or repeated violation of Section 1.2112 of the Commission’s Rules;
- b. To determine whether PCSI engaged in an unauthorized transfer of control, in willful and/or repeated violation of Section 310(d) of the Communications Act of 1934, as amended;
- c. To determine whether PCSI and/or PAI misrepresented material facts to, and/or lacked candor in its dealings , with the Commission, in willful and/or repeated violation of Section 1.17 of the Commission’s Rules;

- d. To determine the effect of Pendleton C. Waugh's felony convictions on his qualifications and those of PCSI and PAI to be and remain Commission licensees;
- e. To determine whether PCSI and/or PAI failed to maintain the continuing accuracy of filings pending before the Commission in willful and/or repeated violation of Section 1.65 of the Commission's Rules;
- f. To determine whether PCSI failed to respond fully and completely to official requests for information from the Commission, in willful and/or repeated violation of Section 308(b) of the Communications Act of 1934, as amended;

Pendleton C. Waugh, Charles M. Austin, and Jay R. Bishop, FCC 07-125, released July 20, 2007

(hereinafter "HDO"). In support, the following is shown:

2. This Motion for Partial Summary Decision is supported by the affidavit of Mr. Waugh which demonstrates that:

- a. Waugh was not a real party in interest to Preferred Communications Systems, Inc ("PCSI") or Preferred Acquisitions, Inc. ("PAI") and did not have an attributable interest in either company;
- b. Waugh did not exercise either *de jure* or *de facto* control over PCSI or PAI;
- c. since Waugh does not have an attributable interest in either PCSI or PAI, his felony convictions (one 15 years old and one more than 10 years old with both stemming from conduct which occurred 16-17 years ago) have no effect on their qualifications to be and remain Commission licensees; and
- d. Waugh has been fully rehabilitated.

Summary resolution of these issues will serve the public interest by bringing a costly and time-consuming matter to an end and speeding service to the public on these channels without undermining the Commission's policy of deterring wrongdoing. In this connection, as demonstrated by Mr. Waugh's affidavit, he fully disclosed his felony convictions to the Commission, they were a matter of record and some notoriety, he followed the advice of

communications counsel regarding any future role he could play in Commission licensees and how his future involvement needed to be disclosed. In short, he has acted in good faith attempting to fully comply with the Commission's Rules and policies.

3. Significantly, the discovery phase of this proceeding has been concluded and, after extensive discovery, no new evidence has been uncovered which would rebut or undermine the facts set forth in this motion. Thus, Waugh, PCSI and PAI have produced thousands of documents covering a period of over eleven years. In addition, both Mr. Austin and Mr. Waugh were deposed by the Bureau for five days each and questioned extensively about the numerous documents. After all of this discovery, there are no material facts showing that PCSI and/or PAI relinquished control to Mr. Waugh or that Mr. Waugh assumed control, nor is there any genuine issue as to as to this matter.

4. As shown in the attached affidavit, Mr. Waugh, because of his guilty plea to the felony charge over ten years ago, resigned as a Chairman and Chief Executive Officer of Telecellular, Inc., a privately held company seeking to acquire Commission licenses and transferred all of his shares in the company to a Voting Trust which specifically prevented him from directing or controlling the Trustee. These actions were taken pursuant to the advice of communications counsel. Mr. Waugh understood that he could serve as a consultant to the company and could hold a beneficial interest in the company through a voting trust controlled by an independent voting trustee. Since his interest was not attributable, his involvement did not have to be disclosed. And, in fact, in a FCC Form 175 filed by Telecellular during this period in connection with its proposed participation in FCC Auction #16, this non-attributable interest was not disclosed.

5. This model was used when Mr. Waugh became involved with PCSI. A voting trust was to be established with an independent trustee. In this connection, Mr. Waugh did not know Mr. Hebrank, the trustee, but was introduced to him by Mr. Austin. The disclosures in FCC filings made on behalf of PCSI and PAI were consistent with the disclosures made by Telecellular and viewed by Mr. Waugh as fully compliant with the Commission's Rules. He was precluded from exercising control over these entities and acted solely as a consultant subject to Mr. Austin's supervision. Every action Waugh took on behalf of these companies was subject to Mr. Austin's review and he had no authority to act on his own. As a consultant, Waugh made a number of recommendations to Mr. Austin. However, as set forth in the attached affidavit, Austin was not compelled to follow Waugh's advice and frequently did not. In short, Waugh did not have an attributable interest in these companies, did not exercise *de facto* control over them, and his involvement therefore was irrelevant for regulatory purposes.

6. The facts developed show that Waugh never controlled the company and was never an undisclosed principal. Using the *Intermountain Microwave* test, 24 RR 983, 984 (1963), the record shows that Mr. Austin, and not Mr. Waugh: (a) had unfettered use of all facilities and equipment; (b) controlled daily operations;¹

¹ In this connection, the Commission has long held that a licensee may delegate the day-to-day operations without surrendering *de facto* control so long as the licensee continues to set the policies governing the operations. *WGPR, Inc.*, 10 FCC Rcd 8140, 8142 (1995); *Choctaw Broadcasting Corp.*, 12 FCC Rcd 8534, 8539 (1997); *Southwest Texas Broadcasting Council*, 85 FCC 2d 713, 715 (1981).

(c) determined and carried out policy decisions, including preparing and filing applications with the Commission; (d) was in charge of employment, supervision and dismissal of personnel; (e) was in charge of payment and financing obligations, including expenses arising out of operations; and (f) received monies and profits from the operation of the business. Consistent with the axiom that control resides with the person who holds the purse strings, Mr. Waugh did not even have authority to write a check and was constantly seeking reimbursement and remuneration from the company. Although he often flooded the company with recommendations as a consultant, his advice was rejected most of the time and without recourse. He has been fired twice. There is simply no genuine issue of fact that would indicate that Waugh controlled either PCSI or PAI. The contrary evidence is overwhelming.

7. Likewise, there is no genuine issue as to Mr. Waugh's qualifications or whether his involvement with PCSI or PAI was misrepresented. As noted above, since Waugh did not have an attributable interest in either PCSI or PAI, his involvement did not need to be disclosed. Even if Waugh's interest is considered to be attributable, his felony convictions were not disqualifying *per se*. In this connection, the Commission has stated that a felony conviction should be considered in assessing a licensee's character qualifications, but it may not necessarily be a dispositive factor, and all such convictions may not be equally probative. See, e.g., *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCCR 3252, (1990) (hereinafter "1990 Policy Statement"). Moreover, the FCC's character policy sets forth a number of mitigating factors to be considered in evaluating misconduct:

the willfulness of the misconduct, the frequency of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, the nature of the participation (if any) of managers or owners, efforts made to remedy the wrong, overall compliance with FCC rules and policies, and rehabilitation.

Contemporary Media, Inc. v. FCC, 214 F.3rd 187, 194 (D.C. Cir 2000), citing *1990 Policy Statement* at 3252. Regarding the currentness of the misconduct, the instructions to FCC Form 301, which is used to file for a new broadcast station, state that, “In responding to Item 6 [which calls for disclosure of any adverse findings including felony convictions against any party to the application], the applicant should consider any relevant adverse finding that occurred within the past ten years.” Although the instructions to the corresponding wireless form, FCC Form 601, do not contain such language, the broadcast form does give an indication of the Commission’s view of the relevance to be placed on an adverse action which occurred over ten years ago based upon misconduct which occurred over fifteen years ago. It is also submitted that Mr. Waugh has been fully rehabilitated over the last fifteen years with a clean record.

Conclusion

8. WHEREFORE, the premises considered, there is no genuine issue of material fact as to the above issues and Summary Decision of the above issues should be granted.

Respectfully submitted,
PENDLETON C. WAUGH

By: /s/ William D. Silva
William D. Silva
His Attorney

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CERTIFICATE OF SERVICE

I, William D. Silva, certify that I have caused a copy of the foregoing "Partial Motion for Summary Decision" to be sent by electronic mail, this 6th day of August, 2009, to the following:

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/s/ William D. Silva
William D. Silva

AFFIDAVIT OF PENDLETON C. WAUGH

I, Pendleton C. Waugh, hereby state under penalty of perjury, that the statements set forth below are true and correct to the best of my knowledge and belief:

1. I began my career in the wireless communications industry in 1988 in my capacity as a corporate and securities attorney. I was retained by the principals of The Cellular Corporation ("TCC"), a FCC license application preparation services firm headquartered in Lakewood, Ohio to assist them in forming a company that would provide construction and management consulting services TCC's clients awarded Rural Service Area ("RSA") cellular licenses.

2. In 1990 I formed Express Communications, Inc. I served as the Chairman of the Board and Chief Executive Officer of Express Communications, Inc., from 1990-1994. The company engaged in the marketing of FCC license applications and limited liability companies to purchase and operate wireless communications systems.

3. In 1995, I plead guilty to conspiracy to violate the currency transaction reporting statute and was sentenced to 21 months in prison, later reduced to 15 months, followed by three years probation and payment of \$20,000 in fines. The FCC was advised of my conviction by my communications attorney, William Franklin, in March 1995 and the Cellular Unserved Area Settlement Groups in which I participated also notified the FCC of my conviction in March 1995.

4. In 1997, summary judgment was granted against me in a suit brought by the Securities and Exchange Commission which also involved Express Communications. I was fined nearly \$13 million as a result.

5. In 1999, I was convicted of a felony in a case brought by the State of Texas arising from my failure to disclose in 1993 that I was under investigation for activities again related to Express Communications. I was sentenced to four years in prison all of which were suspended. I was also ordered to pay \$72,000 in restitution and perform 500 hours of community service.

6. Because of these felony convictions, I was advised by my communications attorneys, Lewis Paper and Jacob Farber of the firm Dickstein, Morin, Shapiro & Oshinsky that I could not remain a principal of Telecellular, Inc., a company which participated in a joint venture with fifteen corporations that held approximately 42 800 MHz SMR Trunked System ("YX") licenses in Puerto Rico. I resigned as Chairman and Chief Executive Officer of Telecellular in April 1997 and my attorneys formed a Voting Trust, the Richard C. Houdek Voting Trust, to which all of my shares in the company were transferred in late 1997. I was advised that this voting trust would be fully compliant with the FCC's policies since I would have no control over the shares or the company or the trustee, but would simply be the beneficiary of the trust. My interest would be non-attributable and I would be simply a passive investor albeit my investment consisted of "sweat equity." I have provided Bureau counsel with a copy of the Richard Houdek

Voting Trust which is dated May 12, 1997. I was also advised that I could serve as a consultant to the company and I served in this capacity from May 1997 to June 1998.

7. While serving as a consultant for Telecellular, Inc., I became acquainted with Mr. Charles M. Austin. Contemporaneously with the formation of Preferred Communications Systems, Inc. ("Preferred"), Charles Austin, his friend, Jay Bishop, and myself, agreed verbally that each of us would hold one third of the equity ownership of the company. At the time, each of us understood that because of my previous criminal convictions, I could not directly hold an attributable interest in the company or serve as a principal. However, I could act as a consultant for the company. I was retained by Mr. Austin as a consultant for Preferred in August 1998, approximately eight months after it had been formed. I had advised Mr. Austin verbally of my prior convictions and provided him with written copies of the convictions and sentencing orders. I also provided Mr. Austin with copies of newspaper articles relating to the modification of my supervised release in July 1996 and the revocation of such supervised release in July 1999. Mr. Austin was also made aware of my convictions through litigation instituted by Telecellular, Inc., against Preferred and Messrs. Austin, Bishop and me in a Texas State Court in August 1998 and by Russell and Lois Wunschel against the same defendants in an Iowa State Court in 1999. Mr. Austin also was made aware of such convictions in Petitions to Deny filed by Telecellular, Inc, and Dee Wunschel with the FCC in 1998-1999.

8. I explained to Mr. Austin that I had been previously advised that I could serve as a consultant to an entity which held FCC licenses without violating any FCC rule or policy. I also advised him that I could not be a principal of such an entity nor hold an attributable interest in such an entity. However, I could hold a non-attributable interest in the form of a Voting Trust of which I would be the beneficiary. I advised him that I could have no control over the company or the stock and that the trustee of the trust had to be totally independent.

9. In March 2000, Mr. Austin invited me to a meeting in Palm Springs, California, to meet with Raymond Hebrank. I had never talked with or met Mr. Hebrank prior to such meeting and at the conclusion of the meeting, Mr. Hebrank agreed to serve as trustee of a voting trust to be established on my behalf. We used the Richard Houdek Voting Trust, the one my communications attorneys had formed in connection with Telecellular, Inc, as a model. In fact, the new Richard Hebrank Trust is almost identical to the earlier Richard Houdek Trust.

10. It was and remains my understanding based upon advice from my communications attorneys that I would be permitted to be the beneficiary of a Voting Trust which held stock in an FCC licensee despite my felony convictions because this interest is non-attributable and I would not be in a position to exercise any degree of control over the licensee. Thus, it is my belief that the voting trust did not confer upon me the right to exercise any control and, in fact, prohibited me from any exercising any control over the licensee entity. See Article VII "Voting Rights" to both the Houdek Trust and the Hebrank Trust which state in pertinent part:

(i) Waugh shall not have the rights to direct or control the Voting Trustee hereunder in connection with matters involving the voting of the Designated Shares by the Voting Trustee (the "Voting Rights"), and (ii) the Voting Trustee shall have absolute and complete discretion to exercise, or refrain from exercising, the Voting Rights in all

matters to which Waugh otherwise would have had any Voting Rights but for the provision of this Article.

PCSI never actually issued stock to the Raymond Hebrank Voting Trust.

11. My only involvement with Preferred was that of a consultant which I understood was permissible. The Order to Show Cause in this proceeding, however, alleges that I was not simply a consultant, but the real party in interest in Preferred and exercised de facto control over the entity. I strongly disagree with these allegations and point to the facts which have emerged as a result of the Bureau's extensive discovery in this proceeding, to which I have fully and completely responded.

12. The Order to Show Cause in this proceeding recites those factors the Commission uses to determine whether control over licenses rests with an entity other than the licensee, to wit: (a) does the licensee have unfettered use of all facilities and equipment; (b) who controls daily operations; (c) who determines and carries out policy decisions, including preparing and filing applications with the Commission; (d) who is in charge of employment, supervision and dismissal of personnel; (e) who is in charge of payment of financing obligations, including expenses arising out of operating; and (f) who receives monies and profits from the operation of the facilities. The facts show, with regard to each of these factors, that I did not control the licensee.

The Licensee Had Unfettered Use of All Facilities and Equipment

13. There is no allegation in the Order to Show Cause that relates specifically to this factor or that suggests that the licensee did not have unfettered use of all facilities and equipment.

Control of Daily Operations

14. Reference is made in the Order to Show cause, paragraph 20, to approximately 2,000 pages of documents, primarily e-mails, during the period from 2004 - 2006 which involved a variety of matters relating to the daily operations of Preferred. Specifically, they identified me as having engaged, on behalf of Preferred, in recruiting, hiring, training, and supervising personnel, and procuring leases, office equipment, and other necessities for the day-to-day operations of the sales office in Escondido, California. I do not deny being engaged in the establishment of the Escondido office, but every action I took was subject to the control of Mr. Austin and no action on my part was taken unilaterally without his prior or subsequent approval.

Employment, Supervision and Dismissal of Personnel

14. I interviewed and hired one person in all of the years I worked as a consultant and this was subject to Mr. Austin's approval. I was fired twice as a consultant by Mr. Austin.

Determination and Effectuation of Policy Decisions Including Preparation

15. As a consultant, I regularly advised and made recommendations to Mr. Austin on policy matters including the filing of applications with the Commission. However, the ultimate decisions were always made by Mr. Austin and he frequently did not follow my recommendations.

Payment of Financing Obligations, Including Operating Expenses

16. I never had authority to sign a check on behalf of the company nor was it my responsibility to pay any of the bills. In fact, as a consultant, I was required to submit to Mr. Austin, every month, a claim for reimbursement for all of the out-of-pocket expenses I incurred in connection with performing my duties. I have produced these reimbursement expense claims in the course of discovery in this proceeding. Many of these claims were never paid, I have an ongoing dispute with Mr. Austin concerning their payment.

Receipt of Monies and Profits from the Operation of the Facilities

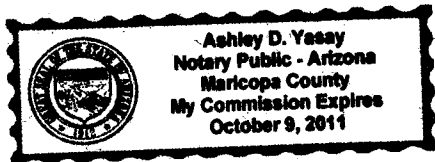
17. I have produced my tax returns for the last ten years in response to the Bureau production request. These returns show that beginning with my 1999 tax return I have not received a salary, but have claimed income only as a self-employed individual.

18. I have not suffered any adverse actions since the two felony convictions in 1994 and 1999. I have acted only as a consultant to Commission licensees since I resigned as an officer and director of Telecellular Inc., in 1997, and I have only held a beneficial interest in Commission licensees since that time. These actions were taken on the advice of communications counsel and it was and continues to be my belief that these actions were fully compliant with the Commission's Rules and policies and were taken in good faith. I understood that I could not hold an attributable interest in any Commission licensee without subjecting the company to concerns about my past felony convictions. I also understood that, as the beneficiary of a voting trust, I would have no control over the company and, in fact, was precluded from exercising control. It was never my intention to conceal my past felonies from the Commission and, in fact, these matters were well known to the Commission. I also believed in good faith and also based upon the advice of counsel, that since I did not hold an attributable interest in PCSI or PAI, these matters would have no affect on their qualifications.

Pendleton C. Waugh

Pendleton C. Waugh

Signed and sworn to before me this 6th day of August, 2009



Ashley D. Yessy
Notary